Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-158

HEPA CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Hepa Corporation (Petitioner) petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The opinion of the Court of Appeals was filed as a Memorandum of the Court on April 2, 1979 (Appendix A). This Memorandum has been approved as a published opinion as an Order of the Court May 29, 1979 (Appendix B). The decision and order of the National Labor Relations Board is reported at 232 NLRB No. 7 (Appendix C). The Hearing Officer of the National Labor Relations Board rendered an opinion on December 3, 1976 (Appendix D).

Jurisdiction.

The Judgment of the Court of Appeals was entered on May 3, 1979 (Appendix E). On May 24, 1979,

the Panel voted to deny Petitioner's request for Rehearing En Banc (Appendix F). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented.

1. Whether the Court of Appeals erred in not applying the standard of *NLRB v. Georgetown Dress* to the activity of pro-union employees who acted as an in-house organizing committee but who were not officially sanctioned or labeled as such.

2. Whether the Court of Appeals erred in considering each of the employer's objections to the union election separately, rather than considering them as a whole.

Statutes Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sections 151, *et seq.*), are as follows:

"Section 8.

(a) It shall be unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) of this title.

"Section 10.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such

order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to

questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to the review by the appropriate United States court of appeals of application was made to the district court as here-the appropriate United States court of appeals if the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Statement of the Case.

This case is brought before the Supreme Court on an application for Writ of Certiorari under 28 U.S.C. Section 1254(1) after a judgment entered by the Ninth Circuit Court of Appeals enforcing the National Labor Relations Board's Order issued against the Petitioner in this matter.

The Union originally filed this Petition in this matter on May 12, 1976. Pursuant to a Stipulated Agreement, an election was held on June 30, 1976. The election was won by the Union 48 to 15.

On August 6, 1976, the company filed six objections to the election. These objections are summarized as follows:

1. During the election campaign, employees of the company, acting as an inplant organizing committee for the union, made threatening remarks to pro-company employees, including direct and indirect threats of bodily harm and loss of employment, which were coercive

in nature and interfered with free exercise of the employee's voting rights.

2. As to the above-mentioned threats, in particular, there was a specific threat of bodily harm against two employees who had expressed pro-company sentiments made by a pro-union employee the morning of the election. This threat was extremely coercive in nature and interfered with the laboratory conditions guaranteed by the Board in order to have a free election.

3. Prior to the election, a union official, speaking at a meeting attended by approximately 50% of the union employees, threatened a pro-company employee, who was questioning him at the time, that he would have him evicted by the police and/or a representative of the National Labor Relations Board and used other abusive language which tended to intimidate and coerce said employee and all those who heard said threat or became aware of it and thereby interfered with the laboratory conditions guaranteed by the Board for a free election.

4. At an organization meeting held by the union the night before the election a union spokesman made certain material misrepresentations to the employees which, because of the nearness of the election, could not be adequately responded to by the company. Said misrepresentations included statements regarding wages, fringe benefits, strikes, unemployment insurance, and other important items, which had a tendency to confuse and coerce the employees and interfere with the free election process.

5. During the election campaign, there was a general pattern of harassment and intimidation of pro-

company employees by members of the inplant organizing committee and other pro-union employees which intimidated said pro-company employees and kept them from speaking out for the company and also coerced other employees from into not joining the pro-company ranks. These acts included verbal abuse, jostling in the halls, the "silent" treatment, and other means of coercion which made it almost unbearable to work at the plant and thereby interfered with the freedom of choice in the election by the employees.

6. During the election campaign, the employees acting as the inplant organizing committee started a false rumor that the company would fire some employees for supporting the union. This rumor tended to place the company in an extremely bad light in the view of those undecided employees and was thereby a material misrepresentation of facts. Since the company did not learn about the rumor until after the election, it did not have an opportunity to respond to it and said rumor thereby interfered with the laboratory conditions necessary for a free election.

A hearing concerning said objections was held on September 30 and October 1, 1976. Subsequent to said hearing, the Hearing Officer issued a report recommending that all of the company's objections be overruled. The Hearing Officer's findings, as attached in Appendix D hereto, found specifically that there was no "in-house" organizing committee of the Union since the pro-union employees who allegedly engaged in misconduct were not "agents" of the union. Also, the Hearing Officer ruled on each of the individual objections of the employer separately and did not consider them in view of the whole atmosphere surrounding

the election. The Hearing Officer ruled that, since the employees were not acting as an in-house organizing committee, each of the individual actions by said employees were not sufficient to set aside the election nor were the acts of the union itself sufficient, standing alone, to set aside the election.

On April 29, 1977, the Regional Director filed a complaint against the company alleging unfair labor practices because the company failed to bargain. In answering the complaint on May 27, 1977, the company denied it was engaged in unfair labor practices. Moreover, the company asserted that it refused to bargain because the June 30, 1976 election was invalid by reason of the objections previously raised and that the Certification of the Union was improper.

On June 14, 1977, the General Counsel moved for Summary Judgment, and on June 29, 1977, the Board transferred the proceeding to itself, and issued a Notice of Order to Show Cause why Motion for Summary Judgment should not be granted. Said Summary Judgment was granted on September 16, 1977, holding that the Petitioner had violated Sections 8(a)(5) and (1) by refusing to bargain and ordered the company to bargain with the union.

The National Labor Relations Board then brought the herein action under Section 10(e) of the National Labor Relations Act as amended. On May 3, 1979, the Ninth Circuit Court of Appeals entered a Judgment enforcing the order of the NLRB. This Writ is sought from that Judgment.

ARGUMENTS.

The Union Should Have Been Held to the Standard of NLRB vs. Georgetown Dress, Because the Pro-Union Employees at Petitioner's Plant Acted as De Facto Inplant Organizing Committee for the Union.

The National Labor Relations Board and the Ninth Circuit Court of Appeals have ruled that the standard of conduct set forth in *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (1976), in regard to the activities of an inplant organizing committee were not applicable in this case because there was no specific agency or authority granted to pro-union employees by the union itself. The decision of the Court clearly ignores the fact that but for specific authorization, these employees acted in the same manner and performed the functions on behalf of the union as those that were performed by the pro-union group found to be an "inplant organizing committee" in the *Georgetown Dress* case.

In the *Georgetown Dress* case, the Court found an inplant organizing committee for the union and held the union responsible under the theory of apparent authority. The nature of the committee was described in that case on pages 1242 and 12433 as follows:

> "This committee had no formal structure, and the membership was open to any employee willing to be known as a member of the committee and to work to enlist support for the Union. Committee members were not paid for any of their services which consisted of soliciting employees to sign authorization cards, to attend Union meetings, or to support and vote for the Union."

Later, on page 1242, in describing how one of the employees described the duties of the committee, the Court stated the following:

> "The duties of the committee included 'signing cards, to ask people would they want a union in the plant of their own free will, to sign a card; and to talk with them on their own time before work, after work, downtown or whatnot.' "

In addition to the above, there were leaflets distributed by some of the committee members which had written at the bottom "inplant organizing committee I.L.G.W.U.". There is also testimony that some of the inplant committee members met with union members outside of the plant and participated in planning union meetings.

The Court pointed out that this inplant organizing committee was the only inplant contact that the union had with the employees since the employer had an obvious anti-union feeling. It was also pointed out that, with the exception of a few isolated incidents (such as a free lunch) the members were totally uncompensated by the union.

In holding that the union was responsible for the acts of the employees who were members of the inplant organizing committee, the Court stated the following:

> "(5) Under the common law, it is not necessary that monetary consideration flow from the principal to the agent to create a principal-agent relationship. Restatement (second) of Agency Section 16 and Comment (b). Thus, *the fact that committee members who committed acts tainting the election atmosphere were volunteers is irrelevant.* Further, the test of whether a principal

is responsible for the illegal acts of an agent is *whether those acts were 'clearly inappropriate to or unforeseeable in the accomplishment of the authorized result.'* Restatement, supra, Section 231, Comment (a). While the acts complained of were unquestionably in violation of Section 8(b)(2), *we cannot say that they were of a nature that a union might not well expect from unsophisticated, untrained employee volunteers to take place in a hard-fought campaign.*"

"(6) Concededly, there is no evidence to show that the union authorized the acts of misconduct, and in that sense the acts are not attributable to the union under the principle of express authority; but we think that *the union is chargeable with the misdeeds under the principle of apparent authority.* The committee members in the eyes of other employees were the representatives of the union on the scene and the union authorized them to occupy that position. While they may have exceeded their authority and, indeed, acted contrary to their express instructions, *their acts were apparently within the scope of their authority, neither their misdeeds nor their authority were repudiated by the union, and their acts did not so far exceed their authority as to make obvious to the persons who were coerced and intimidated that the union would not ratify what was done.* Restatement, supra, Section 8, and Comments (a), (b) and (c). Especially in the light of Section 2(13), which has been noted, the decisions of other courts and of the Board support the conclusion that the members of the committee were *agents of the union so that their misdeeds invali-*

dated the election. NLRB v. Urban Telephone Co., 499 F. 2d 239 (7 Cir. 1974); *NLRB v. Tampa Crown Distributors,* 272 F.2d 470 (5 Cir. 1959); *Local 340, International Board of Operative Potters,* 175 N.L.R.B. 756 (1969); *District 30, UMW (Terry Elkhorn Mining Co.),* 153 N.L.R.B. 562 (1967)" (Emphasis added).

The group of employees who acted in a manner similar to the in-house organizing committee in Petitioner's plant, performed the same acts as those of the in-house organizing committee in *Georgetown Dress* in the following ways:

1. They were all volunteers;

2. They had no formal structure and allowed any employee to participate so long as they tried to enlist support for the union;

3. They solicited employees to sign authorization cards;

4. They wore and distributed to others vote "Yes" buttons on behalf of the union;

5. They spoke to other employees about the union in order to convince them to vote for the union;

6. They encouraged other employees to attend union meetings; and

7. They were the only in-plant contact the union had because of the antipathy of the company to the union (except perhaps the one suspected secret paid organizer whose existence was raised in the answer to the summary judgment).

The only significant differences between the in-plant organizing group in this case and the one in the *Georgetown Dress* case were that (1) there was not an official list kept of the names of

the members; (2) the name "inplant organizing committee" did not appeal on the literature distributed; (3) there were no official meetings testified to between the committee and the union, although there was specific testimony concerning a meeting between union representative Arlene Mordsaini and Olga Bright and Celia Madril the day before the election, presumably to discuss the organizing activities. If the Court is to put substance over form, then it must recognize that just because this group did not call itself an "inplant organizing committee" it does not mean that it was not such a group de facto. The reality was that these members served exactly the same function as the group in the *Georgetown Dress* case and their actions are attributable to the union in the same manner.

It is time for the Supreme Court to recognize and rule that the union may not allow its supporters to engage in illegal tactics and activities and then insulate itself from the consequences of these acts by stating that they are not an official group. The union was obviously aware of these employees' activities since they were wearing and distributing vote "Yes" buttons which were provided by the union, soliciting persons to sign authorization cards which were provided to these employees by the union and performing other acts which directly benefited the union. To state that the union has a lesser duty because these employees did not call themselves an "in-house organizing committee" would totally undermine the doctrine set forth in the *Georgetown Dress* case. The Supreme Court should therefore accept this matter for hearing and rule that the employees acting as an in-house committee can be deemed as such for purposes of union responsibility

even though the union has not specifically authorized them nor do they specifically call themselves an in-house organizing committee.

The Court of Appeals Erred in Considering Each Objection of Petitioner Separately Rather Than Considering Them as a Whole.

A reading of the Appellate Court's Memorandum of Decision makes it clear that it, like the Hearing Officer in his decision, dealt with each of Petitioner's individual objections rather than taking them as a whole.

The Court does not address itself to the Petitioner's argument that, while some of these isolated events are not sufficient to set aside the election, the cumulative effect of these events was sufficient. This combining of circumstances in order to reach an overall effect was discussed by the Board in *TRW Semiconductors, Inc., and I.A.M.*, 159 NLRB No. 43. In that case, the Petitioner (union) tried to isolate various statements made during the Union campaign and state that each statement, standing alone, could not invalidate the election. In rejecting that view, the Court stated the following at page 423:

> ". . . Within his brief, Respondent's counsel has noted—with respect to a particular statement which General Counsel has challenged herein—that such a statement 'cannot rightfully be lifted out of its context (dissected), strained, and then pigeonholed' whenever a determination must be made regarding its statutory propriety. Considered as a theoretical doctrine, certainly, counsel's comment certainly seems well within the mainstream of Board and court decisional pronouncements.

Consistently, therefore, the Board has held that the significant thrust of challenged campaign material cannot be properly assessed by plucking out statements therefrom which, taken by themselves, might be considered less than coercive. With judicial concurrence, agency determinations have been bottomed, rather, upon the 'cohesive combination' of Respondent's statements, which, considered with due regard for their context, have been found violative of the statement."

The threats of physical violence, the harassment and silent treatment of pro-company employees, the threats made to a pro-company employee at a union meeting, the circulating of a false rumor about the company's potential firing of employees favoring the union, and the misrepresentations of a union official on election eve, may not, each of them standing alone, be sufficient to set aside this election. However, taken as a whole, they provide sufficient and adequate grounds for the Court to find that there were not the requisite laboratory conditions to have a free and unfettered election which is required under the rules of the National Labor Relations Act.

Conclusion.

The decision of the Court of Appeals in regard to the in-house organizing committee puts form over substance in finding that there was no such committee. The Supreme Court should rule that pro-union employees acting in the manner of an in-house organizing committee shall be deemed such for setting the standard to which the union will be held accountable. In addition, the Court has failed to deal with Petitioner's argument

that all of the actions of the union and pro-union employees should be taken as a whole in deciding whether a proper atmosphere election has been established rather than isolating each incident and deciding whether it alone was sufficient to satisfy the election. For these reasons, this Petition for Writ of Certiorari should be granted.

Dated at Los Angeles, California, this 30th day of July, 1979.

Respectfully submitted,

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APPENDIX A.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Hepa Corporation, Respondent. No. 78-1215.

Filed: April 2, 1979.

Petition to Review a Decision of the National Labor Relations Board.

Before: HUFSTEDLER and ANDERSON, Circuit Judges, and SOLOMON*, District Judge.

The National Labor Relations Board (Board) petitions this Court to enforce its order which requires respondent, Hepa Corporation, to bargain with California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (union).

The Board conducted a certification election for Hepa's employees in July 1976. The union won the election 48 to 15 with two challenged ballots.

Hepa filed objections to the election. It asserted that the union made unlawful threats, promises, and misrepresentations during the election campaign. It also asserted that certain employees acting as an "in-plant" organization had engaged in similar conduct.

After an investigation, the Board's Regional Director ordered a hearing. After a hearing, the hearings officer recommended that the company's objections be overruled, and his findings and recommendation were adopted by the Board, which certified the union.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

The company still refused to bargain with the union, and the Regional Director issued a complaint alleging that the company's refusal to bargain violated section 8(a)(1) and (5) of the National Labor Relations Act (Act) [29 U.S.C. § 158(a)(1) and (5)].

The General Counsel moved for summary judgment, and the proceeding was transferred to the Board, which denied Hepa's request for a hearing. The Board granted summary judgment against Hepa and ordered Hepa to bargain with the union. The Board has now applied to this Court to enforce this order.

Hepa contends that the order requiring it to bargain with the union should not be enforced because the union was improperly certified and because the Board did not hold a hearing on these charges.

There is no merit in these contentions, and we order the Board's order enforced.

Hepa contends that certain individuals, who it asserts functioned as an "in-plant organizing committee", were responsible for misconduct attributable to the union. Flagrant misconduct attributable to a union authorizing an in-plant organizing committee will invalidate the election. *N.L.R.B. v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976). Here, these individuals acted without union authorization and without apparent authority to act for the union. The Board properly concluded that any misconduct by these employees could not be attributed to the union.

Hepa, nevertheless, contends that misconduct attributable to these individuals invalidated this election. It points to the testimony of an employee who said that a second employee had overheard a third employee tell a fourth employee that two other employees would

be hurt for opposing the union. The Board properly rejected this hearsay. The evidence supports the Board's determination that this election was not invalidated by third-party misconduct.

Hepa contends that a rumor that the company planned to fire employees who supported the union went through the plant before the election and invalidated the election. Both parties agree that the plant was a rumor mill before the election. Hepa's employees were therefore aware of the speculative nature of these rumors. The Board was justified in holding that this rumor did not invalidate this election.

The Board also rejected Hepa's contention that the employees opposed to the union found the atmosphere at the plant coercive because of the attitude of the union's supporters. The Board observed that factionalism and attendant slight verbal friction were usual effects of a partisan election and do not invalidate elections.

The Board also properly rejected the contention that two union representatives at two union meetings invalidated this election. Hepa contended that at the first meeting an employee who opposed the union was improperly silenced and was threatened with expulsion from the meeting. This employee admitted that he was engaged in a heated "shouting contest" with the union representative immediately before this threat, that he remained at the meeting, and that he was permitted to question the union representative. The Board ruled that the attempt of the union representative to regulate the meeting was proper. We agree. Hepa contends that at another meeting held the night before the election a union representative misstated the benefits the

union could provide members, which misstatements were material and substantial. Hepa relies on the NLRB's rule that material and substantial misrepresentations immediately before an election invalidate the election. *General Knit of California*, 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (1978); *Hollywood Ceramics Company, Inc.*, 140 N.L.R.B. 221 (1962).

Hepa contends that the Board did not apply the *Hollywood Ceramics* standard when it decided this unfair labor practices charge but erroneously applied the standard of *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 94 L.R.R.M. 1705, a decision in which the Board announced that it would not review the truth of representations. The Board later reversed the *Shopping Kart* standard. Here, the Board granted summary judgment on its earlier certification of the union, which was announced before *Shopping Kart*, when the Board followed the *Hollywood Ceramics* standard.

We hold that the Board properly refused to invalidate the election, that the statements by the union representatives were properly evaluated, and that the evidence did not substantiate Hepa's allegations of union coercion or that substantial material misrepresentations attributable to the union were made.

Finally, Hepa contends that this order should not be enforced because the Board improperly denied its request for a hearing on this unfair labor practices charge. Hepa did not state what its new evidence would show or how it would affect the Board's decision. Neither did it show that this new evidence was not available at the time of the certification proceeding. There is no merit in Hepa's contention that the Board

was obligated to conduct a hearing because it failed to delineate a clear legal standard on what constituted "in-plant" organization. Here, the Board had found that there was no "in-plant" organizing committee, and the resolution of this contention did not require a hearing.

The Board's decision to certify this election was supported by substantial evidence. The Board's summary judgment against Hepa for refusing to bargain with the union was also proper. The order of the Board is ENFORCED.

APPENDIX B.

Order.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Hepa Corporation, Respondent. No. 78-1215.

Filed: May 29, 1979.

Before: HUFSTEDLER and ANDERSON, Circuit Judges, and SOLOMON,* District Judge.

Motion to convert the Memorandum disposition, filed on April 2, 1979, is granted.

The designation "Memorandum" is stricken, and the Memorandum is converted a Per Curiam Opinion for publication.

*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

APPENDIX C.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Hepa Corporation and California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 21—CA—15679.

Upon a charge filed on April 29, 1977, by California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Hepa Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint on May 17, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 25, 1977, following a Board election in Case 21—RC—14673,

the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 26, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 27, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Specifically, Respondent admitted certain of the factual allegations of the complaint but denied that it committed the unfair labor practices alleged. Affirmatively, Respondent asserts that the Board erred in overruling its objections to the election and that the certification of the Union was, therefore, improper and invalid.

On June 14, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 29, 1977, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On July 16, 1977, Respondent filed a response in opposition to Notice To Show Cause why Summary Judgment should not be granted.

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[1]Official notice is taken of the record in the representation proceeding, Case 21—RC—14673, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding,[2] the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits certain factual allegations of the complaint but attacks the validity of the Union's certification on the grounds that the Board erred in overruling its objections to the election in the underlying representation case. It further asserts that there are factual issues as yet unresolved which require a hearing for proper and complete adjudication. Counsel for the General Counsel, on the other hand, argues that there are no litigable matters warranting a hearing because the issues concerning the Union's certification were litigated and determined in the underlying representation case. We agree with the General Counsel.

A review of the record, including that of the representation proceeding, Case 21—RC—14673, indicates that the Union won the election conducted on July 30, 1976, pursuant to a Stipulation for Certification Upon Consent Election. The tally of votes showed that, of 63 valid ballots cast, 48 were for, and 15 against, the Union, with 2 challenged ballots which were insufficient to affect the results of the election. The Employer, Respondent herein, filed timely objections to the election alleging, in substance, that (1)

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[2]Respondent's request for oral argument is hereby denied as the record and the briefs adequately set forth the positions and contentions of the parties.

an in-plant organizing committee created an atmosphere of fear and coercion preventing a free election by intimidating and demeaning pro-Employer employees, and that members of this in-plant committee should be deemed to be union agents; (2) employees on the in-plant committee threatened bodily harm to two unit employees who had spoken against the Union; (3) a union representative threatened an employee with police eviction from an organizational meeting because he expressed sentiments against the Union; and (4) material misrepresentations occurred during the election campaign and on election-eve.

The Regional Director directed a hearing to resolve the issues raised by the Employer's objections, and on December 3, 1976, the Hearing Officer issued his report and recommendations in which he concluded that all objections should be overruled and the Union certified. Timely exceptions to the Hearing Officer's report were filed by the Employer who contended that the Hearing Officer's findings, conclusions, and recommendations should be reversed, the election set aside, and a second election directed. On March 25, 1977, the Board, after reviewing the record in the light of the Employer's exceptions, adopted the Hearing Officer's findings and recommendations and certified the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

[3]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence,[4] nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Hepa Corporation is a California corporation engaged in the business of manufacturing high efficiency air filtration products in Anaheim, California. During the last 12-month period, it purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning

[4]Respondent asserts in its response to the Notice To Show Cause that it has become aware of evidence indicating that at least one member of the in-plant organizing committee was a paid organizer of Teamsters Local 911. Beyond this bare assertion, Respondent has failed to show that through the exercise of due diligence it could not have uncovered this evidence in time to present it in support of its objections at the representation hearing. Thus, it does not constitute newly discovered or previously unavailable evidence. Moreover, even if Respondent's above assertion were substantiated, Respondent has failed to show that such paid organizer has engaged in conduct warranting relitigation of the representation proceeding.

of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:[5]

> All production and maintenance employees, shipping and receiving employees, laboratory technicians, plant clerical employees, and lead persons employed by the Employer at its facility located at 3071 Coronado Street, Anaheim, California, but excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On July 30, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 21 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-

[5]In its Decision and Certification of Representative dated March 25, 1977, the Board inadvertently failed to list the exclusions from the unit certified.

bargaining representative of the employees in said unit on March 25, 1977, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 29, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 26, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since April 26, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Hepa Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, shipping and receiving employees, laboratory technicians, plant clerical employees, and lead persons employed by the Employer at its facility located at 3071 Coronado Street, Anaheim, California, but excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 25, 1977, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 26, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Hepa Corporation, Anaheim, Cailfornia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, shipping and receiving employees, laboratory technicians, plant clerical employees, and lead persons employed by the Employer at its facility located at 3071 Coronado Street, Anaheim, California, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms

and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 3071 Coronado Street, Anaheim, California, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX D.

Hearing Officer's Report and Recommendations.

United States of America, Before the National Labor Relations Board, Region 21.

Hepa Corporation, Employer and California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case No. 21-RC-14673.

Kenneth M. Simon, Esq., and *Leonard R. Dubin, Esq.*, of Los Angeles, California, for the Employer.

Robert D. Vogel, Esq., of Los Angeles, California, for the Petitioner.

Gilbert Carrillo, Esq., of Los Angeles, California, for the Regional Office.

Before: *Edward P. Nichols,* Hearing Officer.

Pursuant to a Stipulation for Certification upon Consent Election approved on June 14, 1976, an election by secret ballot was conducted on July 30, 1976, under the direction and supervision of the Regional Director of Region 21, among the employees of the Employer, in the unit agreed appropriate for the purposes of collective bargaining.[1] The tally of ballots which was served upon the parties immediately following the election showed the following results:

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[1]Included: All production and maintenance employees, shipping and receiving employees, laboratory technicians, plant clerical employees, and lead persons employed by the Employer at its facility located at 3071 Coronado Street, Anaheim, California.

Excluded: All other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Approximate number of eligible voters.....65
Void ballots..... 0
Votes cast for Petitioner.....48
Votes cast against participating labor organization....15
Valid votes counted.....63
Challenged ballots..... 2
Valid votes counted plus challenged ballots..... 65

The challenged ballots are insufficient in number to affect the results of the election. On August 6, 1976, the Employer timely filed objections to the election, a copy of which was timely served upon the Petitioner. On September 9, 1976, the Acting Regional Director issued a Report on Objections and Order Directing Hearing and Notice of Hearing, copies of which were duly served upon the parties. Pursuant to this Order, a hearing was held before the undersigned duly designated Hearing Officer. The parties were represented at the hearing by counsel and were afforded full and complete opportunity to be heard, to examine and cross-examine witnesses, to present relevant evidence, to argue orally at the hearing, and to file briefs.

Upon the entire record of the hearing[2] and from my observation of the witnesses, their demeanor and testimony, the undersigned Hearing Officer makes the following findings of fact and conclusions of law.

A copy of the Employer's objections are attached hereto.

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[2]The Employer submitted a motion to correct the transcript. There being no opposition thereto, this motion is granted.

Findings of Facts and Conclusions
Objections 1 and 2

The Employer's Objections 1 and 2 allege, in substance, that employees of the Employer who were the "in-plant organizing committee" acting as agents and on behalf of the Petitioner, threatened and restrained employees to prevent them from voting against the Petitioner, which threats included threats of bodily harm to employees opposing the Petitioner, and the creation of an atmosphere of fear and coercion prior to the election for the purpose of coercing them to vote yes in the election.

With regard to these objections, the evidence reveals that, between the filing of the petition and the date of the election, the unit employees generally segregated themselves into groups of those favoring and those opposing representation by the Petitioner. Generally, the employees' position in this regard was signified by the wearing of buttons expressing their views. The testimony of witnesses Shirley Lester and Cindy Dukart, which I credit insofar as this point is concerned, further establishes that approximately six to eight employees in the group favoring representation by the Petitioner, were more vocal in their support than other employees favoring the Petitioner, and they attempted to convert other employees to their position. There is no evidence that these more vocal employees were members of an "in-plant organizing committee," or recognized as such by other employees. The only evidence of contact between representatives of the Petitioner and any of these employees, other than at meetings, was the testimony of Gaylord Hollister, the Employer's production manager, that he observed two of these employees conversing with a representative of the Petitioner, in

the parking lot after work, on the day prior to the election. With regard to these employees acting as agents of Petitioner, there is no evidence of a principal/agent relationship. Under close questioning by Counsel for the Regional Office, witness Dukart credibly testified that she had never been told of, or heard that, any member of the pro-Petitioner group was acting at the direction and control, or as an agent, of the Petitioner. In sum, the evidence fails to establish the existence of an "in-plant organizing committee," or that any employees were "agents" of the Petitioner, but rather that certain employees were more ardent in their support of the Petitioner and vocalized this support, and I so find.

However, the Board has held that conduct not attributable to agents of a participating labor organization who may have engaged in conduct so aggravated as to create a general atmosphere of fear of reprisal which interfered with the employees' free choice in the election warrants setting aside an election.[3] Such conduct is, however, accorded less weight than conduct engaged in by agents of the labor organization involved.[4]

Concerning the threats of physical harm, witness Ludi Roybal testified that she was told by an employee that she overheard a conversation in the restroom between two other employees wherein they had threatened to beat up Roybal's daughter following that days' work. Roybal testified that she told, among others, her daughter, Cindy Dukart, of this alleged threat. Upon being advised of this threat, Dukart and witness Shirley Lester

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[3]*Price Brothers Company*, 211 NLRB 822; *Steakhouse Meat Co.*, 206 NLRB 28.

[4]*Steakhouse Meat Co., supra.*

credibly testified that they proceeded forthwith to the restroom and confronted the named speaker with the alleged threat, who denied it.[5] Inasmuch as the only evidence of this alleged threat is hearsay, I give it no weight. Moreover, this finding, coupled with the open denial of the making of the threat by the alleged speaker, leads me to conclude that no such threat occurred, and I so find.[6]

Concerning the atmosphere of fear and coercion allegedly created by Petitioner's supporters, witnesses Dukart and Lester testified that they were apprehensive of their physical safety prior to the election. Lester testified that this fear was based on the above-mentioned alleged threat of bodily harm and occasional aspersions cast in her direction by the pro-Petitioner employees. She further testified that she left the employ of the Employer subsequent to the election due to this apprehension. However, the undersigned finds it difficult to credit this testimony, as Lester also testified to the immediate confrontation with the other employee who allegedly had uttered the threat, as well as her initiation of two other heated confrontations with pro-Petitioner employees. She further credibly testified to attending a meeting held by the Petitioner, to which she wore a pro-Employer insignia and where she engaged in a heated debate with pro-Petitioner employees. This conduct militates against her testimony that she was apprehensive of her safety and that an atmosphere of fear and coercion existed, as she appears to have continued to vocally express her views regarding repre-

[5]Lester was apparently dissatisfied with this denial, as she, in turn, threatened to damage the employee's new car if any harm befell her.

[6]*Price Brothers Company, supra.*

sentation by the Petitioner and, on numerous occasions, took the offensive against such representation. With regard to her testimony that she terminated her employment due to her apprehension, Lester credibly testified on cross-examination that a friend with whom she had been living had moved to a different state, and that shortly thereafter she had relocated to the same state. This testimony, coupled with my finding that Lester exhibited no behavior usually associated with apprehension, leads me to conclude that her real reason for leaving the Employer was for reasons other than an attempt to escape any alleged coercive atmosphere at the Employer's facility.

Witness Dukart testified, in substance, that she based her fear upon conduct of the pro-Petitioner employees, including occasional remarks concerning her parentage and social activities, and being jostled in hallways without apology. However, she further credibly testified that she continued to wear her pro-Employer insignia, engaged in an informal but heated debate with a representative of the Petitioner on the evening before the election, and voted in the election.

The undersigned, having reviewed the foregoing testimony, concludes that an atmosphere of fear and coercion was not created by pro-Petitioner employees. At most, I find that employees supporting both the Petitioner and the Employer advanced their respective views and that occasionally their zeal led them to verbal bouts. There is no evidence of physical violence or credible evidence of threats thereof, nor is there evidence that as a result of any actions by any employees that others did not vote. In sum, the evidence reveals the give-and-take of the expression of views normally associated with an election, and does not

constitute conduct which warrants setting aside the election.

Accordingly, the undersigned recommends that Objections 1 and 2 be overruled in their entirety.

Objection 3

In Objection 3, the Employer alleges, in substance, that as a part of the pattern of coercion discussed in Objections 1 and 2, representatives of the Petitioner threatened to call the police to evict a pro-Employer employee from a meeting conducted by the Petitioner.

At the hearing, employee James Brewster testified that he attended a meeting held by the Petitioner, away from the Employer's premises, approximately 2 weeks prior to the election. Upon arriving at the meeting, Brewster interrupted the presentation and began questioning the Union representative, Arlene Mordasini, about her ability to "guarantee" what she was stating the Union would gain for the employees if successful in its organizational effort. Brewster, who was wearing a "Vote No" button on this occasion, engaged in a heated exchange with Mordasini, who eventually told him, in substance, to be seated and cease causing a disturbance, or leave the meeting. It is unclear whether Mordasini specifically threatened to call the police to evict Brewster, as he only recalls the mention of the word "police."

The testimony of Lester is of relevance to this objection as it indicates that during this same period of time the Employer mailed to the employees a document bearing several statements in which the employees were told to ask the Union if it could "guarantee" anything.[7]

[7]The Employer introduced in evidence as Employer's Exhibit 2 a document fitting this description, and the parties stipulated that this document was provided the employees prior to the election.

While there is no direct testimony that Brewster referred to this document in his exchange with Mordasini, it is inferable by the nature of his questioning and the timing of the mailing of this document *vis a vis* the date of this meeting, that it was relied on by Brewster, and I so find.

From the foregoing, it is apparent that Brewster attended the Petitioner's meeting with an obect of closely questioning Mordasini concerning various representations she had made, and that the Employer, at least in part, provided the basis for Brewster's actions. It further appears that the questioning became argumentative rather than inquisitive, and the progress of the meeting was thereby disrupted. This then caused Mordasini to act in the manner that she did. Based on the foregoing, I conclude that the conduct of Mordasini in silencing Brewster with a threat of eviction, but nonetheless permitting him to remain in the meeting, does not warrant setting aside the election.

Accordingly, the undersigned recommends that Objection 3 be overruled.

Objection 4

Employer's Objection 4 alleges, in substance, that at an organizational meeting the night before the election, Petitioner's representative misrepresented several material facts to the employees attending this meeting, at a time when the Employer had no ability to respond thereto. These misrepresentations include the fact that the Employer had several sources of supply for the necessary raw materials to the manufacture of its product, when, in fact, it had but one such supplier, and also that the Union guaranteed certain improved

wages and benefits should it be selected as bargaining representative.

With regard to this objection, witnesses Dukart and Lester testified that Petitioner's representative, John Matull, was asked questions at a meeting the evening before the election concerning layoffs due to a shortage of the special paper used in manufacturing the Employer's product. According to these witnesses, Matull replied that he did not think the company would limit itself to but one source of supply. Witness James Nader credibly testified that but one firm was capable of producing paper which met the Employer's requirements, and that this paper was in short supply due to a strike at the supplier. He further credibly testified that this situation became known by the Employer during the week prior to the election, and the Employer's president advised the employees of this situation at a meeting held the day prior to the election. While I credit the testimony of the above witnesses which establishes the occurrence of events as set forth, the undersigned finds that the statements by Matull did not constitute a material misrepresentation which affected the results of the election. In so concluding, I note there is no evidence of Matull guaranteeing that the Employer had other sources of supply for its raw materials, but rather, simply stating an opinion in response to a question from an employee. Assuming, *arguendo*, that Matull had made such a guarantee, it is at best a minor campaign inaccuracy which does not warrant setting aside the election, and the employees are capable of analyzing such a statement for the campaign puffery that it represents.[8] Lastly, I note

[8]*Hollywood Ceramics Company, Inc.*, 140 NLRB 221; *Georgia-Pacific Corporation*, 199 NLRB 240.

that the Employer had placed the source of its supply in issue prior to Matull's comments, by advising the employees of the situation with regard thereto on the day before the election and before the Petitioner's meeting.[9]

With regard to the second portion of Objection 4, witnesses Lester, Brewster, and Dukart credibly testified that at the meeting conducted by the Petitioner the evening prior to the election, Matull spoke, *inter alia*, on the subjects of wages, fringe benefits, and strikes. Lester and Dukart testified that Matull did not "guarantee" an increase in wages or better benefits, but rather, stated that he generally was successful in his negotiations with the Employer's representatives. With regard to strikes, both witnesses testified that Matull stated that he doubted that a strike would be necessary, but that if it were necessary, the employees would have to approve such actions prior to its occurrence. Matull also advised the employees that negotiations would have to take place between the Employer and the Petitioner, at which representatives of both parties would meet and discuss wages and benefits. With regard to the testimony of Brewster, he initially testified in substantial accord with the above set forth testimony of Lester and Dukart. However, following a recess during which he reviewed an affidavit which he had provided the Employer, he altered his testimony to state that Matull had guaranteed the above benefits. In these circumstances, I credit Brewster's initial recounting of the events, as his demeanor was far more responsive and spontaneous to the questioning while testifying on that occasion, whereas following the review

[9]*Convalescent Hospital Management Corporation, d/b/a Elmcrest Convalescent Hospital*, 173 NLRB 38.

of the affidavit, his testimony appeared to be stilted and coached.

Another factor to be considered in this objection is the above-mentioned testimony that the Employer provided the employees with a document bearing several questions with regard to strikes, wages, and benefits. The employees were advised that they were to ask the Petitioner if it could "guarantee" what it was stating with regard to these items. Thus, it appears that the issue of whether or not the Petitioner could guarantee any results with regard to wages and benefits was injected into the campaign by the actions of the Employer.

In view of the foregoing evidence, the undersigned concludes that at the Petitioner's meeting on the evening prior to the election at which Matull addressed the employees, he did not guarantee that a vote in favor of the Petitioner would automatically result in higher wages and better benefits, or the absence of a strike. I find that what Matull did do was to give a speech which was optimistic in its expressions that increased benefits could result from negotiations with the Employer's representatives.[10] Moreover, it appears that the Petitioner's ability to guarantee such increases was raised by the Employer in its letter to the employees preceding this metting, in which it suggested that they ask the Union to make such a guarantee.[11] Thus, the Union's remarks in this regard were in response

[10]"Prattle rather than precision is the dominating characteristic of election publicity." *Olsen Rug Company v. N.L.R.B.*, 260 F. 2d 255, 257. The Board, in considering guarantees similar to those in the instant case, determined that they fell within the ambit of "prattle." *Janler Plastic Mold Corporation*, 208 NLRB 167, 170.

[11]*Allison-Haney, Inc.*, 185 NLRB 852.

to the Employer's campaign efforts and the employees were in a position to evaluate the matter from having heard both positions. In view of the foregoing, the undersigned recommends that Employer's Objection 4 be overruled in its entirety.

Objection 5

Employer's Objection 5 alleges, in substance, that prior to the election, the Petitioner's "in-plant organizing committee," while acting as agents of the Petitioner, intimidated employees who favored the Employer by creating an atmosphere in which it was socially unacceptable to vote in favor of the Employer.

As discussed above, the testimony of witnesses Lester and Dukart reveals, in general, that as the election campaign of the Employer and the Petitioner gained momentum, the employees formed into groups of those favoring and those opposing representation by the Petitioner. Witnesses Lester, Dukart, and Roybal testified that as the election drew near, certain members, but not all, of the group of employees supporting the Petitioner, ceased speaking with them, and occasionally whispered and laughed just out of their hearing. The testimony of Lester and Dukart indicates that members of the employee group opposing representation by the Petitioner continued to speak with them. These three employees further testified that they continued to wear their "Vote No" buttons, expressed their views with regard to representation by the Petitioner, and all voted in the election.

The undersigned views this factionalism as a result of an election campaign, and any social friction between the groups as conduct which does not warrant setting aside an election, especially when there is no evidence

that this conduct served to intimidate employees not to express their views and/or to vote in the election.

The Employer cites in *N.L.R.B. v. Georgetown Dress Corp.*, ... F. 2d ..... (C.A. 6, 1976), 92 LRRM 3282, in support of its assertion that this conduct constitutes objectionable conduct warranting setting aside the election. I find this case inapposite. There, the Court, contrary to the Board, found that agents of the participating labor organization had engaged in numerous acts creating an atmosphere of fear and coercion, including threats of immediate physical harm, bloodshed, and job loss, if they voted against the participating labor organization. This conduct is clearly far more coercive than that of two groups of employees not speaking to one another immediately prior to the election, as in the instant case, and each group continuing to maintain its particular viewpoint, and voting in the election. Accordingly, I recommend that Objection 5 be overruled.

Objection 6

Employer's Objection 6 alleges, in substance, that immediately prior to the election a rumor was spread that management was going to terminate employees who had supported the Petitioner. This rumor, according to the Employer, did not come to its attention until after the election, thus, it had no opportunity to respond.

Witnesses Dukart and Lester credibly testified that they heard from fellow employee Sally Benz that the Employer was going to lay off or terminate employees who had supported the Petitioner and that this would occur immediately following the election. Neither Dukart nor Lester questioned Benz as to her source of

information. There is no evidence that the Petitioner was aware of, authored, or condoned this rumor.

The Board has held that a Union's authoring misinformation regarding an Employer's alleged callous treatment of an employee, which may tend to cause employees' adherence to the Union for protection, to be conduct warranting the setting aside of an election.[12] However, in those cases the petitioning union had deliberately misrepresented the Employer's actions with regard to the affected employee, whereas in the instant case, there is no evidence that the Petitioner was aware of the rumor, much less deliberately authored it. Moreover, the testimony, particularly that of witness Roybal, indicates that the Employer's plant was a virtual "rumor mill" prior to the election, with several renditions of numerous rumors circulating among the employees about matters concerning the election. Thus, it appears that the employees were well aware of rumors, and thus capable of analyzing the subject rumor as but another among many.[13]

Accordingly, in these circumstances, the undersigned recommends that Objection 6 be overruled.

Recommendation

The undersigned, having made the above findings of fact and conclusions, recommends that the Employer's Objections be overruled, and that California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

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[12]*Weslock, Division of Tool Research & Engineering Corporation*, 199 NLRB 549, 550; *Ipson Industries Division of Alco Standard Corporation*, 180 NLRB 412.

[13]*General Housing Industries, Inc.*, 197 NLRB 24.

be certified as the exclusive collective-bargaining representative of the employees in the appropriate unit.[14]

DATED at Los Angeles, California, this 3rd day of December, 1976.

/s/ Edward P. Nichols
Edward P. Nichols
Hearing Officer

Order.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Hepa Corporation, Respondent. No. 78-1215.

Filed: May 24, 1979.

Before: HUFSTEDLER and ANDERSON, Circuit Judges, and SOLOMON,* District Judge.

The panel voted to deny the petitioner's petition for rehearing. Judges Hufstedler and Anderson voted to reject the suggestion for a rehearing in banc, and Judge Solomon has recommended the rejection of the suggestion for a rehearing in banc.

The full court was advised of the suggestion for an in banc rehearing. No judge has requested a vote on this suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

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[14]Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D. C. Exceptions must be received in Washington by December 16, 1976.

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX E.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Hepa Corporation, Respondent. No. 78-1215.

Before: HUFSTEDLER and ANDERSON, Circuit Judges, and SOLOMON*, District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of an order issued by it against RESPONDENT, Hepa Corporation, Anaheim, California, its officers, agents, successors, and assigns, on September 16, 1977. The Court heard argument of respective counsel on January 8, 1979, and has considered the briefs and transcript of record filed in this cause. On April 2, 1979, the Court, being fully advised in the premises, issued its memorandum granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Hepa Corporation, Anaheim, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with California Teamsters Public, Professional and Medical Employees Union Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, shipping and receiving employees, laboratory technicians, plant clerical employees, and lead persons employed by the Employer at its facility located at 3071 Coronado Street, Anaheim, California, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 3071 Coronado Street, Anaheim, California, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 21 of the National Labor Relations Board (Los Angeles, California), after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all

places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

Costs in this court favor the petitioner and against the respondent.

28 copies of petitioner's opening brief	$202.32
28 copies of petitioner's reply	33.72
Records reproductions	54.00
	$290.04

SO ORDERED:
JUDGES:
/s/ Shirley M. Hufstedler
Shirley M. Hufstedler, CJ
/s/ J. Blaine Anderson
J. Blaine Anderson, CJ
/s/ Gus J. Solomon
Gus J. Solomon, DJ

Endorsed, Judgment Filed and Entered

/s/ Emil E. Melfi
Emil E. Melfi
Clerk

A TRUE COPY,
ATTEST:
Emil E. Melfi
Clerk

APPENDIX F.

Order.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Hepa Corporation, Respondent. No. 78-1215.

Filed: May 24, 1979.

Before: HUFSTEDLER and ANDERSON, Circuit Judges, and SOLOMON,* District Judge.

The panel voted to deny the petitioner's petition for rehearing. Judges Hufstedler and Anderson voted to reject the suggestion for a rehearing in banc, and Judge Solomon has recommended the rejection of the suggestion for a rehearing in banc.

The full court was advised of the suggestion for an in banc rehearing. No judge has requested a vote on this suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

No. 79-158

Supreme Court, U. S.
FILED
SEP 27 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

HEPA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 597 F. 2d 166. The decision and order of the National Labor Relations Board (Pet. App. 7-17) are reported at 232 N.L.R.B. 37. The report and recommendations of the hearing officer in the related representation proceeding (Pet. App. 18-32) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33-35) was entered on May 3, 1979. The petition for a writ of certiorari was filed on July 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain pro-union employees constituted an in-plant organizing committee that acted as an agent of the union and whether the conduct of those employees warranted setting aside a representation election won by the union.

STATEMENT

The California Teamsters Public, Professional and Medical Employees Union, Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"), won a representation election among petitioner's employees by a vote of 48-15 (Pet. App. 9, 18-19). Petitioner filed timely objections to the election, alleging that certain employees, functioning as an in-plant organizing committee for the Union, intimidated, demeaned and threatened other employees who opposed the Union (Pet. App. 9-10). Petitioner also alleged that a union representative threatened an anti-union employee with police eviction from a meeting and that material misrepresentations of fact occurred during the campaign (Pet. App. 10).

A hearing was held to take evidence on petitioner's objections. The hearing officer concluded that the employees concerning whose activities petitioner had objected did not constitute an in-plant organizing committee (Pet. App. 21) and that no atmosphere of fear and coercion was created (Pet. App. 23). Thus, while "six to eight employees * * * were more vocal in their support than other employees favoring [the Union], and they attempted to convert other employees to their position" (Pet. App. 20), these employees were not authorized to act for the Union nor did other employees recognize them as agents of or acting for the Union (Pet. App. 20-21). The

only evidence of contact between the Union and any of these employees, other than at general union meetings, was the testimony of petitioner's production manager that he once observed two of these employees conversing with a representative of the Union after work (Pet. App. 20-21). The hearing officer further concluded that no threats of physical harm were made by any pro-union employee (Pet. App. 22) and that there was no evidence that a rumor which circulated just prior to the election that petitioner would discharge pro-union employees was attributable to or condoned by the Union or that it was given any credence by the employees (Pet. App. 30-31).

He also found that union representatives did not materially misrepresent the potential benefits of unionizing (Pet. App. 27-28) and that the incident in which police eviction from a union meeting was threatened—the employee was permitted to remain at the meeting—did not warrant setting aside the election (Pet. App. 24-25). The hearing officer ultimately concluded that all of petitioner's objections should be overruled. The Board adopted the findings and recommendation of the hearing officer and certified the Union (Pet. App. 1). Petitioner subsequently refused to bargain with the Union. The Board found that this refusal violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to recognize and bargain with the Union (Pet. App. 7-17).

The court of appeals noted that flagrant misconduct on the part of a union-authorized in-plant organizing committee will invalidate an election. It found, however, that no such committee existed here. It also found that the record did not reveal any conduct by pro-union employees that could invalidate the election. Accordingly, it enforced the Board's order (Pet. App. 1-5).

ARGUMENT

Petitioner contends (Pet. 8-13) that the vocal pro-union employees should have been found to be an "in-plant organizing committee," as existed in *NLRB* v. *Georgetown Dress Corp.*, 537 F. 2d 1239 (4th Cir. 1976), and that their misconduct should have been imputed to the union, thus invalidating the election. This contention is without merit.

This case does not conflict with *Georgetown Dress*. There, the court concluded that, while the employees did not act under "express authority" from the union, the "union [was] chargeable with the misdeeds under the principle of apparent authority. The committee members in the eyes of other employees were the representatives of the union on the scene and the union authorized them to occupy that position." 537 F. 2d at 1244. Here, the court found that the employees "acted without union authorization and without apparent authority to act for the union" (Pet. App. 2). In *Georgetown Dress*, a formal In-Plant Organizing Committee was formed pursuant to a contact with a union organizer. The union had dinner meetings with Committee members, relied on the Committee for "soliciting employees to sign authorization cards [and] to attend Union meetings," and paid for campaign literature bearing the Committee's name. 537 F. 2d at 1242-1243. The court there specifically found that the Committee members were seen by the other employees as representatives of the union and were authorized by the union to occupy that position. *Id.* at 1244. Here, the other employees did not regard the employees alleged to be members of a committee as agents of the Union; moreover, the purported "committee members" had no meetings with the Union, and they were distinguishable

from other pro-union employees only in that they were more vocal.[1] Thus, the only issue actually presented by the petition is the correctness of the court's factual finding that no committee existed here, an issue that does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the hearing officer's conclusion, upheld by the Board and the court, that there was no in-plant organizing committee was correct.[2]

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[1]Moreover, the conduct in *Georgetown Dress*, *supra*, involving threats of violence and knife-wielding (537 F. 2d at 1241), was more flagrant than the conduct alleged here.

[2]There is no substance to petitioner's additional argument (Pet. 13-15) that the court failed to consider the cumulative impact of the alleged misconduct. The Board, upheld by the court, found no evidence of coercion or misrepresentations on the part of the Union or its representatives. The Board and the court held that the allegations against certain employees did not amount to misconduct that should invalidate the election.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

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SEPTEMBER 1979

DOJ-1979-09